Office - Supreme Court, U.S.
FILED
MAR 2 1982
ALEXANDER L. STEVAS,
CLERK

81-1619

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FREDERICK P. FURTH
(Counsel of Record)
THOMAS R. FAHRNER
DANIEL S. MASON
MICHAEL P. LEHMANN
CRAIG C. CORBITT
FURTH, FAHRNER, BLUEMLE & MASON
201 Sansome Street, Suite 1000
San Francisco, California 94104
Telephone: (415) 433-2070

Attorneys for Petitioner Georgia-Pacific Corporation

Of Counsel:
JAMES M. NICHOLSON
THOMAS E. WITHYCOMBE
WILLIAM E. CRAIG
GEORGIA-PACIFIC CORPORATION
900 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 222-5561

Dated: March 2, 1982

QUESTIONS PRESENTED

Conspiracy:

1. Can a conspiracy to fix one element of a price be inferred from conscious parallel conduct plus direct communications, where it is not shown that such communications involved discussion or agreement concerning that element?

2. Can absent parties be held to be antitrust co-conspirators with parties before the court, where the only evidence relied upon by the trial court in connecting those absent parties to the conspiracy found by the jury is conscious parallel conduct?

Damages:

3. In a "single-element" price-fixing case, can the measure of damages be based solely upon consideration of the only element which allegedly has been fixed?

4. Must the trial court instruct the jury that the measure of damages in a price-fixing case is based upon the difference between the total price paid and what the total price would have been absent a conspiracy?

PARTIES TO THE PROCEEDINGS

In addition to petitioner, appellants below were Weyerhaeuser Company and Willamette Industries, Inc.

In addition to Lyman Lamb Company, appellees below were Plywood Distributing Company, Baton Rouge Lumber Company, and the City of Arkadelphia, Arkansas. The remaining plaintiffs in the cases consolidated for trial in *In re Plywood Antitrust Litigation,* Multidistrict Litigation No. 159, and the remaining members of the plaintiff class, consisting of all persons who purchased softwood plywood directly from the

manufacturers during the period from February 23, 1968 through December 31, 1973, also had an interest in the outcome of the appeal.*

* The following entities are subsidiaries and affiliates of Georgia-Pacific Corporation: Ashley, Drew & Northern Railway Company; California Western Railroad; Fordyce and Princeton R.R. Co.; Four Hundred Health Club, Inc.; Georgia-Pacific Export, Inc.; Georgia-Pacific Finance Company; Georgia-Pacific Leasing Corporation; Aztec Trading Company, S.A.; Compania de Navegacion Arboreous, S.A.; Exchange Oil & Gas Corporation; Bayou Hydrocarbons, Inc.; Georgia-Pacific International Corporation; Anaconias Compensados e Laminados, Limitada; Beaver Wood Fibre Company, Limited (The); Federal Packaging and Partition Company Limited; G-P Inveresk Corporation; Georgia-Pacific Building Materials Sales, Ltd.; Georgia-Pacific GmbH; Georgia-Pacific S.A.; Georgia Steamship Company, Inc.; Inveresk Group Limited; Lianga Bay Logging Company, Inc.; Magallanes Trading Company, S.A.; Metro Steamship Company; P.T. Georgia-Pacific Indonesia; P.T. Kalimanis-Plywood Industries; Georgia-Pacific Investment Company; National Management, Inc.; St. Croix Pulpwood Company; St. Croix Pulpwood, Limited; Holly Hill Lumber Company; Hudson Pulp & Paper Corp.; Hudson American Corp.; O.P.M. Co., Inc.; Montana Pacific International; Rex Timber Inc.; Saint Croix Water Power Company—New Brunswick (The); The Sprague's Falls Manufacturing Company (Limited); St. Croix Water Power Company—Maine; and Thacker Land Company.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
I. Preliminary Statement	3
II. History Of The Proceedings	5
A. The Plywood Industry	5
B. The FTC Proceeding And The Ninth Circuit Decision	6
C. The Present Case: Trial And Affirmance By The Fifth Circuit	8
REASONS FOR GRANTING THE WRIT	12
I. The Fifth Circuit Applied Erroneous Legal Standards In Upholding The Conspiracy Verdict	12
A. The Holding Conflicts With The Rule In Other Circuits That Conscious Parallelism Plus Opportunity Contacts Will Not Support A Finding Of Conspiracy	12
B. The Courts Below Erred In The Application Of The "Slight Evidence" Rule To The Alleged Co-Conspirator Absent Parties	17
II. The Fifth Circuit Erred In Upholding The Single-Element Measure Of Damages	19
A. Damages In Single-Element Price-Fixing Cases Must Be Measured With Reference To The Price Of The Whole Product	19
B. The Trial Court's Failure To Instruct The Jury On Measure Of Damages Was Reversible Error	25
CONCLUSION	28
ADDENDUM (Excerpts Of Jury Instructions)	a

Note: A Joint Appendix, containing all material required by Supreme Court Rule 21(k), has been filed by petitioner, Weyerhaeuser Co. and Willamette Industries, Inc.

TABLE OF AUTHORITIES

CASES — PAGE(S)

Albertson's, Inc., v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D.Utah 1973), *aff'd in part, vacated in part*, 503 F.2d 459 (10th Cir. 1974) 22

Berkey Photo, Inc. v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) 19, 23

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 20, 22

Boise Cascade Corp., 91 F.T.C. 1 (1978) 6, 7

Boise Cascade Corp. v. *FTC*, 637 F.2d 573 (9th Cir. 1980) 2, 4, 6, 7, 8, 16, 21

Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) 4, 22, 23

Chagas v. *Berry*, 369 F.2d 637 (5th Cir. 1966), *cert. denied*, 389 U.S. 872 (1967) 26

City of Mishawaka, Ind. v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) 20, 21

Gainesville Utils. Dept. v. *Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978) 14

Hanson v. *Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) 16

Herman Schwabe, Inc. v. *United Shoe Mach. Corp.* 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) 23

Hunt v. *Mobil Oil Corp.*, 465 F.Supp. 195 (S.D.N.Y. 1978), *aff'd*, 610 F.2d 806 (2d Cir. 1979) 16

ILC Peripherals v. *IBM Corp.*, 458 F.Supp. 423 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp.* v. *IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 3126 (1981) 24

In re Folding Carton Antitrust Litigation, 83 F.R.D. 251 (N.D. Ill. 1978) 22

In re Folding Carton Antitrust Litigation (Dean Foods Co. v. *Alton Box Bd. Co.)*, 1980-2 CCH Trade Cas. ¶63,460 (N.D. Ill. 1980) 16

In re Plywood Antitrust Litigation, 76 F.R.D. 570 (E.D. La. 1976) .. 9

In re Plywood Antitrust Litigation, 1979-1 CCH Trade Cas. ¶62,459 (E.D. La. 1978) 2, 17, 25

In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir.), *reh. denied*, 663 F.2d 101 (5th Cir. 1981) 1, 13, 14, 16, 18, 24

Jacobi v. *Bache & Co.*, 377 F.Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) 24

J. Truett Payne Co. v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981) 20, 23

Landy v. *FAA*, 635 F.2d 143 (2d Cir. 1980) 26

CASES — PAGE(S)

Mid-West Paper Prods. Co. v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979) 18

Norfolk & W. Ry. Co. v. *Liepelt*, 444 U.S. 490 (1980) 26

Ohio ex rel. Brown v. *Mahoning County Medical Soc'y*, 1980-1 CCH Trade Cas. ¶63,100 (N.D. Ohio 1979) 18

Oreck Corp. v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 639 (1981) 16

Overseas Motors, Inc. v. *Import Motors, Ltd.*, 375 F.Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975) 16

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 22

Pevely Dairy Co. v. *United States*, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950), *overruled on other grounds, In re Coca Cola Bottling Co. of Black Hills* v. *Hubbard*, 203 F.2d 859 (8th cir. 1953) 14

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 19, 20

Schoenkopf v. *Brown & Williamson Tobacco Corp.*, 483 F.Supp. 1185 (E.D. Pa.), *aff'd*, 637 F.2d 205 (3d Cir. 1980) 16

Siegel v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) 23

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 20

Theatre Enterprises, Inc., v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) 4, 17

Tose v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981) 16

Union Carbide and Carbon Corp. v. *Nisley*, 300 F.2d 561 (10th Cir.), *cert. dismissed*, 371 U.S. 801 (1962) 23, 24

United Shoppers Exclusive v. *Broadway-Hale Stores, Inc.*, 1966 CCH Trade Cas. ¶71,727 (N.D. Cal. 1965) 16

United States v. *Borden Co.*, 111 F.Supp. 562 (N.D.Ill. 1953), *aff'd and remanded per curiam*, 347 U.S. 514 (1954) 14

United States v. *Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978) 18

United States v. *Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978) 18

United States v. *FMC Corp.*, 306 F.Supp. 1106 (E.D.Pa. 1969) 16

United States v. *General Motors Corp.*, 1974-2 CCH Trade Cas. ¶75,253 (E.D.Mich. 1974) 16

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 14

CASES — PAGE(S)

Vandervelde v. *Put & Call Brokers' & Dealers' Ass'n*, 344 F.Supp. 118 (S.D.N.Y. 1972) 18

Venzie Corp. v. *United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975) 13, 14, 15

Wall Products Co. v. *National Gypsum Co.*, 357 F.Supp. 832 (N.D. Cal. 1973) 24

Weit v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *petition for cert. pending* (No. 81-152) 13, 14, 15

Zenith Radio Corp. v. *Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100 (E.D.Pa. 1981) 18, 19

STATUTES

Clayton Act, Section 4, 15 U.S.C. Section 15 8

Federal Trade Commission Act, Section 5, 15 U.S.C. Section 45 . 6, 12

Judiciary Act, 28 U.S.C. Section 1254(1) 2

Sherman Act, Section 1, 15 U.S.C. Section 1 ..... 2, 3, 12

RULES

Federal Rules of Civil Procedure, 23 ..... 4, 5, 20

Federal Rules of Civil Procedure, Rule 49(a) 26

Rules of the United States Supreme Court, Rule 21(k) iii

OTHER AUTHORITIES

Wall Street Journal, Sept. 9, 1981, at 56, c.2 4

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Georgia-Pacific Corporation respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on September 8, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, *In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir.), *reh. denied,* 663 F.2d 101 (5th Cir. 1981) appears, along with the judgment denying rehearing *en banc,* as Appendices A and G, respectively. The unreported judgment and order of the District Court for the Eastern District of Louisiana appear as Appendix B. The order denying the motion for *j.n.o.v.* and a new trial, unofficially reported at 1979-1 CCH Trade Cas. ¶ 62,459 (E.D.La. 1978), appears as Appendix C. Because of

its direct application to the issues raised in this petition, the opinion of the Court of Appeals for the Ninth Circuit in *Boise Cascade Corp.* v. *FTC,* 637 F.2d 573 (9th Cir. 1980) is also included as Appendix J.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on September 8, 1981, and timely petitions for rehearing and rehearing *en banc* were denied on November 3, 1981. On January 18, 1982, this Court extended the time for filing this petition to March 3, 1982.[1]

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . ."

---

[1] Petitioner joins in the separate petition for certiorari filed by Weyerhaeuser Company and Willamette Industries, Inc., who also were defendants at the trial below and appellants in the Court of Appeals, and adopts the reasons for granting the writ set forth in that petition.

STATEMENT OF THE CASE

I.

PRELIMINARY STATEMENT.

This case involves an aspect of the pricing practices of the plywood industry which was simultaneously the subject of a Federal Trade Commission proceeding and this civil antitrust suit under Section 1 of the Sherman Act. The challenged practice is the industry's use of a pricing system in which the delivered price of plywood was the sum of (1) an individually negotiated mill price; and (2) freight charges, either based upon the rail freight rate from the West Coast, or computed at "standard" rather than actual weights. Thus, the total delivered price was determined by inclusion of a freight charge which generally exceeded the actual cost of shipment; the mill price component (and thus the total delivered price) was determined on a competitive basis.

The Fifth Circuit left standing a jury verdict against Georgia-Pacific Corp., Weyerhaeuser Company, and Willamette Industries, Inc. (plus dozens of other alleged co-conspirators who settled prior to trial), for fixing the price of the freight element of the total purchase price of plywood. The Fifth Circuit held that a conspiracy was properly inferred, despite the lack of any evidence beyond conscious parallel conduct plus contacts providing an opportunity to conspire; it thus applied a legal standard directly in conflict with recent decisions of the Third and Seventh Circuits. Moreover, the verdict joining absent parties to this conspiracy was allowed to stand on the basis of "slight evidence" consisting only of conscious parallel conduct; this ruling is totally unprecedented.

The Fifth Circuit also approved a "single-element" formula, based upon the freight factor alone, for the measure of damages to plywood purchasers—a formula submitted to the jury *sua sponte* by the trial court, through "all or nothing" special interrogatories, without instructions that any other element of the price could be considered. As a result, the entire amount by which this one element (the freight cost of plywood) allegedly was artificially raised was held to be the exact

amount by which the total purchase price of plywood was raised. This damage measure conflicts not only with the decisions of other circuits which have considered the issue, but with the decision of the Ninth Circuit, in reviewing a parallel action against the same defendants initiated by the Federal Trade Commission, that the challenged practices had *no* adverse effect on the total purchase price. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980), App. J.

The incongruent result of the Ninth and Fifth Circuit decisions is that in the former proceeding, the court found no evidence that purchasers of plywood had paid higher prices as a result of the practices at issue, while in the latter proceeding, petitioner and its co-defendants were found liable under a damage measure which could result in enormous payments to those same purchasers. Estimates of damages reported in the press are truly staggering—ranging as high as *two billion dollars.*[2] According to respondents' counsel, "[i]f the formula (for assessing damages) reached by the jury is applied, this will probably represent the largest antitrust verdict in history."

Review by this Court is particularly important because this petition presents antitrust issues which the Court has never directly addressed, including the standard of proof beyond conscious parallel conduct necessary to permit an inference of conspiracy (*see Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954)), and the appropriate standard for measuring damages in antitrust cases involving products with multiple pricing elements. Although the Court considered the issue of liability for fixing a single element of a total purchase price in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), the issue of measuring damages in such cases was not resolved.

These issues assume further significance because they arise in the context of a large, multidistrict class action. The tension between the policy of Rule 23 of the Federal Rules of Civil

---

[2] *Wall Street Journal*, Sept. 9, 1981, at p.56, c.2. Petitioner does not concede that the total damages will be anywhere near this amount, even should the result below stand. There is no doubt, however, that the total liability will be substantial if the verdict below is upheld.

Procedure, which encourages the aggregation of individual claims, and the rights of individual defendants to insist upon reasonable proof before entry of the enormous judgments made possible by this procedural device—judgments which are trebled under the antitrust laws—is sharply presented by the facts of this case.

II.

HISTORY OF THE PROCEEDING.

A. The Plywood Industry.

In the years prior to 1964, when virtually all plywood was manufactured in the Pacific Northwest, the practice developed of quoting a purchase or "delivered" price consisting of two parts: (1) an individually negotiated "mill" price (also known as the "base" or "index" price), plus (2) a freight charge based upon the rail freight rate from the West Coast to the geographic zone of delivery ("West Coast freight"). Since the ICC tariffs resulted in identical freight costs for all sellers to ship to a given geographic area, it was the variation in mill prices which resulted in variations in delivered prices. Because most plywood was sold before its weight was known, the practice also developed of quoting freight according to "standard" rather than actual weights, so that the purchaser could be provided with a firm delivered price at the time of quotation.

In 1964, following technological advances which made possible the use of Southern pine to make plywood, petitioner Georgia-Pacific opened the first plywood mill in the South. Other plywood producers soon followed. In the early years of the Southern plywood industry, the Western mills remained the dominant suppliers, even in the South, and Western plywood commonly was perceived as the superior product. Southern producers attracted customers for their newer product by quoting prices that were generally lower than those for Western plywood. To provide ease of comparison for buyers, Southern producers adopted the same manner of price quotation as their Western competitors: individually negotiated mill prices plus West Coast freight calculated according to standard weights. As explained by the Ninth Circuit, and confirmed by the record below:

> "The use of West Coast freight enabled buyers to compare western and southern plywood prices by reference to a single mill or index price, knowing that the precise difference would be reflected in a total delivered price. Without West Coast freight, comparison would also have been more cumbersome because southern freight rates are point-to-point rather than zone rates and vary according to the weight of the load." (637 F.2d at 574 n.1, App. at J-2 to J-3.)

Not only were Southern prices generally lower than Western prices, but the delivered prices among both Southern and Western producers differed from seller to seller and from transaction to transaction, fluctuating according to supply and demand, and in response to changing market conditions. *Id.* at 577, App. at J-9.

B. The FTC Proceeding And The Ninth Circuit Decision.

The Federal Trade Commission initiated an action in April 1974, against the three trial defendants below, Georgia-Pacific, Weyerhaeuser and Willamette, plus two additional plywood producers, Boise Cascade Corp. and Champion International Corp. That complaint charged these producers with violating section 5 of the FTC Act (15 U.S.C. §45) by their use, individually and in combination, of the West Coast freight and standard weight systems described above. Following an initial decision of the Administrative Law Judge in 1976, the Commission issued an Opinion and Order in January 1978, which directed the producers to cease and desist from quoting West Coast freight, on the ground that "the concurrent although noncollusive adoption by competitors of an artificial method of pricing which restrains competition" was unlawful under section 5. *Boise Cascade Corp.*, 91 F.T.C. 1, 103 (1978). However, the Commission found that the practices in question had arisen innocently. The Commission concluded that the producers were "obviously not" engaged in "a price fixing cartel" (*id.* at 99 n.10, 102, 105), and declined to adopt the ALJ's alternative finding that a Sherman Act conspiracy could be inferred. The Commission added: "[W]e hasten to note

that the practice of including West Coast freight in delivered price quotations is only one of many factors affecting the price of southern plywood." *Id.* at 98.

In May 1980, the Ninth Circuit denied enforcement of the Commission's Order, holding that there was no evidence that the challenged practices had undermined price competition or had artifically raised the purchase price of plywood. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980), App. J. The Court of Appeals found that petitioner's delivered pricing practice was "a natural and competitive development in the emergence of the southern plywood industry" (*id.* at 582, App. at J-18), observing that the purchase price of plywood appeared to have been unaffected by the practice:

> "Over the long run, the price for plywood sheathing rises or falls in response to market factors affecting supply and demand: housing starts, weather conditions, box car shortages and strikes. *We have found no evidence in the record suggesting that the price of plywood has been unresponsive to market conditions.*
>
> * * * * *
>
> "We need not discuss all the evidentiary disputes between the parties to determine that *there is not substantial evidence in the record, considered as a whole, to sustain the Commission's finding that petitioners' delivered pricing methods stabilized prices in the plywood industry at supranormal levels.* In truth, the Commission has provided us with little more than a theory of the likely effect of the challenged pricing practices.
>
> * * * * *
>
> "In light of the precedents and the statements of leading authorities on delivered pricing, including the Commission itself, *the existence of substantial bargaining in the base price of plywood provides at least a prima facie inference*

> *that competition has not been affected by the use of West Coast freight."* (*Id.* at 577, 578, 579-580, App. at J-9, J-11 to J-12, J-13 to J-14; emphasis added.)[3]

In addition, the Ninth Circuit found no basis to suspect that the purchase price would have differed, had "actual" rather than "West Coast" freight been quoted:

> "The Commission has cited no evidence that tends to disprove *the common-sense proposition that southern producers would simply adjust the index* [mill] *price upwards if they were quoting delivered prices in terms of actual freight.*" (*Id.* at 580, App. at J-14; emphasis added.)

This "common sense" proposition directly contradicts the assumption implicit in the measure of damages approved by the Fifth Circuit—that the mill price would have been *exactly the same* had actual freight been quoted. Moreover, the Ninth Circuit's conclusion that the record did not evidence an anti-competitive increase in purchase prices is directly contradicted by the Fifth Circuit's approval of a measure of damage formula that those prices were raised by exactly the amount by which West Coast freight exceeded actual freight.

C. The Present Case: Trial And Affirmance By The Fifth Circuit.

The trial of the private actions, filed under section 4 of the Clayton Act (15 U.S.C. §15), commenced in October 1978, after the FTC decision but before the Ninth Circuit announced its decision refusing to enforce the FTC's order.

Four points about the record are necessary to an understanding of the questions presented by this petition.

First, the evidence of a conspiracy or agreement to utilize the delivered price system was entirely circumstantial. No witness testified to any such agreement and no document

---

[3] The Ninth Circuit also found "a complete absence of evidence implying overt conspiracy" (*id.* at 582, App. at J-18), and declined "to follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a *per se* violation of section 5 by analogy to section 1 price-tampering cases." *Id.* at 581, App. at J-16.

reflected one. Although there were minor differences from the FTC record, the substance of the evidence in the trial below was identical. Respondents introduced voluminous findings of fact from the FTC proceeding, and repeatedly stressed the parallel to the Commission's action. Vol. 45, Tr. 152-83; Vol. 56, Tr. 3244. Respondents' only live witness was an economist who conceded that the West Coast freight system had no impact whatsoever on delivered prices at the outset of the Southern plywood industry, but contended that the freight "overcharge" should have "evaporated" over some unspecified period of years to reflect the differences between West Coast and actual freight; he insisted that the supply and demand characteristics of the plywood industry were irrelevant to his analysis. Vol. 53, Tr. 2464-72. No plywood purchaser testified that the West Coast freight system had adversely affected delivered prices.

Second, the jury in effect was instructed that it could find an unlawful conspiracy to maintain the freight pricing practices from no more than (1) the parallel use of these practices by the producers; and (2) proof of lawful contacts between some of them.

Third, at the close of evidence, the trial court submitted special interrogatories to the jury on the appropriate measure of damages, despite the fact that no direct evidence had been presented and no jury instructions had been submitted on this issue by either side. In fact, the trial court had previously bifurcated damage issues from liability issues, and subsequently acknowledged that petitioners had understood that the measure of damages would not be tried in the liability phase.[4] The special interrogatories, however, combined the issue of measure of damages with the preliminary fact of damage question:

---

[4] *See* Vol. 59, Tr. 656. The measure of damages ultimately adopted was specifically *disclaimed* by respondents during the class certification proceedings in 1976, a position which the district court relied upon in part in ordering class certification: "There is no contention that defendants added a uniform freight charge to a uniform base price to arrive at their delivered prices." *In Re Plywood Antitrust Litigation,* 76 F.R.D. 570, 581 (E.D. La. 1976), App. at D-17. Consistent with this position, respondents submitted the following proposed jury instruction:

footnote continued on following page

"2. (a) Did the use of 'West Coast freight' in the pricing of Southern Pine plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?

"(b) if 2(a) is answered 'yes', was that damage equal to the amount by which 'West Coast freight' exceeded the actual freight charge (or the pick-up allowance)?

* * * * *

"4. (a) Did the use of 'standard weights' in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?

"(b) If 4(a) is answered 'yes', was that damage equal to the amount by which freight calculated on the basis of 'standard weight' exceeded the actual freight charge?" (App. at I-2 to I-3.)

These interrogatories did not provide the jury with a means by which it could indicate that damages were incurred in some amount *less* than the *entire* amount of the freight "overcharge." For example, if the jury had found that, without the delivered price system, an amount equal to 70% of the

---

footnote continued from previous page

"In this part of the case, all that you are called upon to decide is whether the defendants did combine to fix prices, or any part of the price they charged; and, second, whether what they did had any influence or effect on that aspect of the price. *You will not now be asked to determine the specific amount of damage suffered by any plaintiff or plaintiffs as a whole, but only whether the acts of defendants did some damage to one or more of the plaintiff class in some amount, however large or small.* If you find that they did combine and there was any such effect on what the plaintiffs or any of them paid, then you must find in favor of plaintiffs and against defendants, leaving for further proceedings the specific amount to be determined." (Pls. Proposed Inst. No. 45, emphasis added.)

Until the windfall opportunity presented by the trial court's interrogatories, respondents gave no indication that they had changed their position.

freight "overcharge" would have been added to the mill price and 30% would have been passed through to the purchasers in the form of lower net prices, there was no means provided for the jury to communicate that conclusion. Instead, the jury would have been compelled to give a "no" answer to the damages interrogatories. In this way, the form of the submission implied to the jury that unless it answered "yes," defendants would have no damage liability whatever, even if the jury concluded that some (but not all) of the "overcharge" did add to the ultimate delivered price to plywood purchasers.

Fourth, the trial court altogether failed to instruct the jury in any respect as to the law governing the measure of damages, or the legal principles applicable to the damage interrogatories; it merely observed that plaintiffs sought "yes" answers, and defendants sought "no" answers to the above questions. Specifically, it did not tell the jurors that they should consider whether, had the plywood producers not utilized the delivered price system, the mill price of plywood would have increased to some extent; and that if it would have increased, then the damages due to the freight "overcharge" would be diminished to that extent. *See* Addendum, pp. d-f.

In November 1978, the jury returned a verdict that Georgia-Pacific, Weyerhaeuser and Willamette had engaged in (1) a conspiracy with all other Southern pine plywood manufacturers to use "West Coast freight" in plywood pricing, and (2) a conspiracy with all other softwood plywood manufacturers to use the "standard weight" system in the pricing of Western fir plywood. Not surprisingly, the jury adopted the only measure of damages (apart from zero) suggested by the trial court's interrogatories: the differences between West Coast freight and actual freight, and between standard weights and actual weights.[5]

On September 8, 1981, the Fifth Circuit affirmed in all respects the trial court's judgment entered from the jury verdict.

---

[5] Thereafter, the trial court granted summary judgment to respondents, four sample plaintiffs, and fixed the amounts of their individual damages, which total more than $1.1 million. The calculation of individual damages for other class members is the subject of current proceedings in the trial court.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit finds antitrust liability under Section 1 of the Sherman Act for practices which the Ninth Circuit held could not be restrained under the less exacting standard of Section 5 of the Federal Trade Commission Act. And while the Ninth Circuit found unrefuted the "common-sense proposition" that without use of the industry's freight pricing system, plywood producers would have increased their mill prices, in the present case the courts below found that plywood purchasers have been damaged by the entire amount of the freight "overcharge." As a result, the petitioners stand exposed to massive treble damages—by respondents' own estimate as much as two billion dollars.

As will be shown, these anomalous determinations are not the result of inconsistent factfinding upon different records. Rather, the judgment in the present case is the product of fundamental errors of law by the trial court and the Fifth Circuit which in turn led to a judgment differing dramatically from that of the Ninth Circuit. Both in finding a violation of Section 1 and in determining the measure of damages, the courts below proceeded in a manner contrary to the prevailing rules of law. Review of the important legal questions presented does not require scrutiny of the factual record, for the issues arise from the basis upon which the case was submitted to the jury, and the Fifth Circuit's affirmance.

I.

THE FIFTH CIRCUIT APPLIED ERRONEOUS LEGAL STANDARDS IN UPHOLDING THE CONSPIRACY VERDICT.

A. The Holding Conflicts With The Rule In Other Circuits That Conscious Parallelism Plus Opportunity Contacts Will Not Support A Finding Of Conspiracy.

This case was submitted to the jury on instructions which permitted it to find an unlawful conspiracy based upon no more than: (1) the defendants all utilized the challenged West Coast freight system; and (2) some of the defendants communicated

with one another with respect to various matters, occasionally including West Coast freight, but never agreed as to any of those matters. The Fifth Circuit affirmed, on the basis that evidence of that and no more is legally sufficient to establish a conspiracy or agreement to restrain trade. The lower courts' understanding of the law squarely conflicts with decisions of the Seventh and Third Circuits. *See Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *petition for cert. pending* (No. 81-152); *Venzie Corp.* v. *United States Mineral Prods. Co.*, 521 F.2d 1309 (3d Cir. 1975). The standard employed authorizes a finding of conspiracy unjustified by rational inferences from the evidence, thereby permitting the imposition of massive treble damages upon sheer speculation by the jury.

1. *Submission To The Jury.* The Fifth Circuit's incorrect ruling stemmed directly from the trial court's error of omission in instructing the jury. The trial court failed to instruct the jury that mere parallel conduct does not warrant the inference of conspiracy, when it is coupled only with communications which do not concern the subject matter of the conspiracy, or which do not indicate agreement about that subject matter. No *limiting* instructions to this effect were given to the jury. The jury was told of other factors it *could* consider, *e.g.*, the existence of intercompetitor sales agreements which used West Coast freight or standard weights, whether the parallel pricing practice "made sense in light of the economic industry conditions," *etc.*[6] *See* Addendum, pp. b-d. However, these factors were not identified as limitations or conditions upon a finding of liability, but only as permissible subjects of jury consideration. Thus, *the jury remained free to return a verdict of liability even if none of these other factors were found applicable, and it found nothing more than parallel pricing behavior and an opportunity for competitors to communicate.*

2. *The Fifth Circuit Opinion.* The Court of Appeals upheld the jury's verdict on the basis of a record consisting of two primary items of evidence: *First,* conscious parallel behav-

---

[6] Appropriate objections to the court's instructions were made at trial. Vol. 56, pp. 3574-77. Petitioners submitted proposed instructions which would have cured the defects. Defs. Supp. Inst. 8, 8(a), 8(b).

ior among plywood manufacturers in the use of West Coast freight and standard weights. *Second,* petitioner, its co-defendants at trial, and a few other producers occasionally communicated with each other, and some of those communications involved some aspect of pricing. The evidence did not show that the so-called conspirators *ever discussed* standard weights, or that they conspired with respect to West Coast freight.[7] On this record, the Fifth Circuit applied the following legal standard:

> "The parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict." (655 F.2d at 634, App. at A-9.)

This standard is contrary to the prevailing rule of law.

3. *The Law Of Other Circuits.* The result below cannot be reconciled with the decisions of the Seventh and Third Circuits in the *Weit* and *Venzie* cases cited above. In *Weit,* it was alleged that various banks conspired to fix the interest rate paid by a class consisting of certain consumer credit card holders. The evidence consisted, *inter alia,* of parallel interest rates, business contacts between officials of the banks, and meetings

---

[7] The discussions among the plywood producers arguably evidence price information exchanges. Standing alone, however, such exchanges are not *per se* violations, but must be judged under the Rule of Reason. *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978). Indeed, routine monitoring of rival business practices (which the evidence here reflects) is fully consistent with competition. *See Pevely Dairy Co.* v. *United States,* 178 F.2d 363, 368-69 (8th Cir. 1949), *cert. denied,* 339 U.S. 942 (1950); *United States* v. *Borden Co.,* 111 F.Supp. 562, 576 (N.D.Ill. 1953), *aff'd in part and remanded in part per curiam,* 347 U.S. 514 (1954).

This case is thus quite unlike *Gainesville Utils. Dept.* v. *Florida Power & Light Co.,* 573 F.2d 292 (5th Cir.), *cert. denied,* 439 U.S. 966 (1978), upon which the Fifth Circuit relied. 655 F.2d at 634, App. at A-9. In *Gainesville,* the evidence consisted of parallel refusals to deal plus communications between the alleged conspirators which "border[ed] on a blatant agreement to divide the market." 573 F.2d at 301.

among bank officials to plan a compatible credit card system; during some of these meetings the subject of the alleged conspiracy (interest rates) was discussed. 641 F.2d at 460, 462. The Seventh Circuit affirmed the trial court's entry of summary judgment against plaintiffs, on the ground that this evidence showed nothing more than "opportunity to conspire," and thus was not probative of a conspiracy. *Id.* at 462-65.

Weit stands for the proposition that evidence of parallel activity plus the opportunity to conspire, where the parallel activity is in the independent business interest of each alleged co-conspirator, will not permit the inference of a conspiracy. Moreover, direct communications among alleged co-conspirators engaging in identical pricing conduct will not support a finding of conspiracy where there is no evidence that the communications reflected any agreement concerning the subject matter of the purported conspiracy.

In an analogous holding, the Third Circuit in *Venzie* affirmed the entry of a *j.n.o.v.* on a refusal to deal claim. The alleged evidence of conspiracy consisted, as in *Weit*, of parallel conduct, opportunity contacts among alleged co-conspirators and proof of actual meetings among the defendants at which they purportedly discussed the subject of the alleged conspiracy, plaintiffs' trade inquiries. 521 F.2d at 1312-13. The defendants rebutted this evidence with denials that any conspiratorial agreement had been reached. The Court of Appeals agreed that the evidence of conspiracy was insufficient to go to the jury, explaining:

> "While the jury was free to disregard the defendants' testimony that no agreement of any kind was formulated during the course of these contacts, mere disbelief could not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy. Furthermore, while proof of contacts between the manufacturer and its licensee during the crucial summer period may demonstrate an opportunity for formation of a conspiracy,

such *an opportunity is significant only if other evidence permits an inference that an agreement did in fact exist.*" (*Id.* at 1313, emphasis added).[8]

4. *Need For Review By This Court.* Under the standard adopted by the Third Circuit in *Venzie* and the Seventh Circuit in *Weit*, the evidence in this case would be insufficient as a matter of law to support an inference of conspiracy. "Communication between high-level personnel on pricing policy" (655 F.2d at 634; App. at A-9) is no stronger evidence than the communications between high-level personnel on credit terms and purchase inquiries found inadequate in *Weit* and *Venzie*, respectively. Indeed, the evidence in *Weit* and *Venzie* was *stronger* than in *Plywood*, since the alleged subject matters of the conspiracy clearly were discussed. The standard applied by the Fifth Circuit and endorsed implicitly by the trial court in its jury instructions is nothing more than the "conscious parallelism plus opportunity contacts" rule rejected by the Third and Seventh Circuits. Particularly in light of the Ninth Circuit's observation that the parallel conduct at issue here was consistent with each plywood manufacturer's individual self-interest (637 F.2d at 578, App. at J-11), the evidence of additional opportunity contacts should not have permitted the inference of conspiracy.

---

[8] Numerous other cases support the above analysis. *See, e.g., Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894-95 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 639 (1981); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *In re Folding Carton Antitrust Litigation (Dean Foods Co.* v. *Alton Box Bd. Co.)*, 1980-2 CCH Trade Cas. ¶ 63,460 at 76,431 (N.D.Ill. 1980); *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 483 F.Supp. 1185, 1189-92 (E.D. Pa.), *aff'd*, 637 F.2d 205 (3d Cir. 1980); *Hunt* v. *Mobil Oil Corp.*, 465 F.Supp. 195, 231 (S.D.N.Y. 1978), *aff'd*, 610 F.2d 806 (2d Cir. 1979); *United States* v. *General Motors Corp.*, 1974-2 CCH Trade Cas. ¶ 75,253 at 97,667 (E.D.Mich. 1974); *Overseas Motors, Inc.* v. *Import Motors, Ltd.*, 375 F.Supp. 499, 535 (E.D.Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States* v. *FMC Corp.*, 306 F.Supp. 1106, 1124-25, 1129 (E.D. Pa. 1969); *United Shoppers Exclusive* v. *Broadway-Hale Stores, Inc.*, 1966 CCH Trade Cas. ¶ 71,727 at 82,271 (N.D. Cal. 1965).

The conflicting legal standards concerning the evidence beyond parallel conduct necessary to show antitrust conspiracy should be resolved by this Court. In the 28 years since *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), when this Court held that conscious parallelism alone cannot prove a conspiracy, the Court has not directly addressed the question of what "plus factors," or proof beyond conscious parallelism, suffice to show one. Unless antitrust liability is to be left to subjective, impressionistic or capricious factfinding by juries—exonerating some while holding others liable—guidance from this Court is urgently required.

B. The Courts Below Erred In The Application Of The "Slight Evidence" Rule To The Alleged Co-Conspirator Absent Parties.

The trial court applied the so-called "slight evidence" rule to link many of the absent parties (previously settled defendants) to the conspiracies found by the jury, thereby increasing the joint and several liability of petitioner and the trial defendants.[9] The slight evidence upon which it relied, however, was that "*the challenged practices were industry-wide in scope* and were employed by all manufacturers." 1979-1 CCH Trade Cas. at 76,697, App. at C-3; emphasis added. In other words, the trial court held (and the Fifth Circuit affirmed *sub silentio*) that once a conspiracy is established, only conscious parallelism need be shown in order to connect additional co-conspirators. To our knowledge, no other reported antitrust decision applying the slight evidence rule has ever held that mere

[9] The first of these conspiracies (involving West Coast freight) allegedly included the three trial defendants and 16 other Southern softwood plywood manufacturers who were named as defendants but who settled prior to trial. The second (involving standard weights) allegedly included the three trial defendants and 19 other Western fir plywood manufacturers who were again named as defendants but who settled prior to trial, as well as the 16 Southern plywood producers mentioned above.

For a few of these absent parties there was evidence of direct communications in addition to conscious parallelism; but for the vast majority of them, the evidence relied upon in linking them to either of the alleged conspiracies was parallel conduct.

conscious parallelism will link an alleged co-conspirator to a conspiracy.[10]

Important policy reasons justify the Court's granting a writ of certiorari to review this issue. As the Third Circuit observed in an analogous context (denying standing to purchasers from defendants' competitors based upon an alleged overall industry price rise caused by defendants' conspiracy):

> "Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits, because ... price fixers would be held accountable for higher prices that arguably ensued in the entire industry. Notwithstanding the seriousness of the per se violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws." (*Mid-West Paper Prods. Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 586-87 (3d Cir. 1979).)

We recognize that "solemnized covenants to conspire are difficult to come by in any price fixing case." 655 F.2d at 633, App. at A-6. Surely it is not a corollary, however, that evidence

---

[10] *Cf. United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978) (in a base price-fixing conspiracy case, proof of discussions regarding prices, and advance exchanges of bids constitute slight evidence); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978) (proof of conversations regarding the switching of suppliers and agreements as to allocations of accounts constitute slight evidence); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1169-70, 1265-98 (E.D.Pa. 1981) (proof of intercompany export agreements, membership in trade associations and parallel use of rebates do not constitute slight evidence); *Ohio ex rel. Brown* v. *Mahoning County Medical Soc'y*, 1980-1 CCH Trade Cas. ¶ 63,100 at 77,504 (N.D. Ohio 1979) (proof of efforts to get non-conspiring doctors fired and membership and participation in the illegal practices of committees constitute slight evidence); *Vandervelde* v. *Put & Call Brokers' & Dealers' Ass'n*, 344 F.Supp. 118, 155 (S.D.N.Y. 1972) (mere membership in a professional association does not constitute slight evidence).

such as that found sufficient in this case constitutes "proof of knowing, intentional participation in illegal activities." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1149 (E.D.Pa. 1981). This Court should address the fundamental issues of antitrust conspiracy law presented here.

II.

THE FIFTH CIRCUIT ERRED IN UPHOLDING THE SINGLE-ELEMENT MEASURE OF DAMAGES.

A. Damages In Single-Element Price-Fixing Cases Must Be Measured With Reference To The Price Of The Whole Product.

The second important issue raised by this petition is the appropriate measure of damages in single-element price-fixing cases.

In a price-fixing case, it is fundamental that "[t]he measure of damages to one of the conspirators' customers is the difference between the price actually paid and the one at which the product would have sold absent the conspiracy." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), *citing Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979).

The product purchased by the plaintiffs in this case was plywood, not the freight charge for delivering plywood; the latter is merely one component of the total price. If the plaintiffs have in fact been injured, the measure of their damages is the difference between the total price (including freight) which they paid for plywood, and the total price (including freight) at which plywood would have sold absent the conspiracy. The measure of damages in this case is erroneous because it only focuses on the freight element of the price, improperly assuming that the overall purchase price of plywood was raised *ipso facto* by an amount equal to the amount by which the freight element allegedly was raised. The mill price is assumed to be a constant by this analysis, regardless of the existence or absence of a conspiracy. The Fifth Circuit's approval of this automatic, "one element" rule of

damages is not only economically irrational, but conflicts with the holdings of other circuits and the past guidelines of this Court.

Petitioner recognizes this Court's long-standing admonition that a distinction exists "between the measure of proof necessary to establish the fact [of] some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). Nevertheless, "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Moreover, in the 36 years since *Bigelow*, when this Court last fully addressed the standards for measuring damages in antitrust cases, private antitrust litigation has significantly expanded, spurred especially by the advent of Rule 23 of the Federal Rules of Civil Procedure. *See Reiter* v. *Sonotone Corp.*, *supra*, 442 U.S. at 343 n.6.

In view of the procedural short cuts that allow for class-wide proof of impact and encourage class-wide damage formulas, it is particularly important that the measurement of damages in class actions reflect, as accurately as possible, the actual injury suffered by class members. The staggering amounts typically at stake in such cases call for, at a minimum, the most accurate measure reasonably possible—one which at least considers all elements of the price.

This Court must rearticulate the appropriate antitrust damage standards. The policies that liability should not go unpunished, and that it "does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted" (*J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981)), are rightfully strong. However, they do not justify the substitution of speculative, incomplete theories in place of proof which reasonably relates damages awarded to actual injury suffered.

The Legal Standard. The fallacy of uncritical reliance on automatic damage formulas was well illustrated in *City of Mishawaka, Ind.* v. *American Electric Power Co.*, 616 F.2d 976

(7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). There, a private utility company and its affiliates were found by the district court to have violated the Sherman Act by charging excessive "wholesale" rates to municipal customers, in comparison with the rates charged to their retail customers. In the words of the Court of Appeals:

> "[T]he [district] court found that the municipalities had been overcharged by the amount the wholesale rates charged them exceeded the amounts which they would have been charged under the utility's retail rates actually in effect. The court proceeded to award damages based solely on a tripling of the difference between the higher wholesale rates paid by the municipalities and the lower retail rates which the utility actually charged its retail customers . . . No other factor entered into the computation." (616 F.2d at 987.)

Observing that "[t]he formula used by the trial court is recommended by its simplicity, but the computation of damages should not be expected to be quite that much easier than the rest of this case," the Seventh Circuit rejected the above measure of damages, and held that the district court had improperly assumed that the wholesale and retail rates charged by the utility would have been equivalent in the absence of the antitrust violation. *Id.* The district court's assumption was found to be "totally without foundation" since, apart from the different methods of calculating rates imposed by regulatory authorities, "in all likelihood, the utility has dissimilar fixed and variable cost requirements which it must seek to cover in its respective wholesale and retail rates." *Id.*

Likewise, the measure of damages approved by the courts below is premised on the unsupported assumption that the mill price of Southern plywood would have been identical absent the use of West Coast freight and standard weights. The trial court's "all or nothing" damage interrogatories did not permit the jury to question this assumption, which not only is unsupported by the record, but was rejected by the Ninth Circuit as defying "common sense." *Boise Cascade Corp.* v. *FTC*, 637 F.2d at 580, App. at J-14.

A similar point was made by the district court in *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D.Utah 1973), *aff'd in relevant part, vacated in part*, 503 F.2d 459, 463 (10th Cir. 1974), where the plaintiffs alleged that a zone delivered pricing system unlawfully fixed the freight element of the purchase price of sugar. The district court observed that the very assumption made by plaintiffs and the lower courts in this case—that the base-price level was a constant—was untenable:

> "[Plaintiffs] assumed that their cost of sugar would be lowered by an amount equal to the phantom freight they now pay. If base point pricing were to be abandoned, it is clear that [defendants] would have to raise their base price.... The evidence indicates that some new basis price would have to be set...." (62 F.R.D. at 53.)[11]

This Court has also recognized that damage inquiry cannot end with a simple, mechanical determination that isolates only one aspect of a supposed restraint of trade; rather, all relevant factors bearing on the amount of plaintiffs' claimed damages must be considered. "The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages...." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140 (1968). Reasonable estimates of damages by antitrust plaintiffs are acceptable so long as they are "not shown to be attributable to other causes." *Bigelow* v. *RKO Pictures, supra*, 327 U.S. at 264.

The Court in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), clarified the issue of liability in cases involving products with multiple pricing components, holding that a

---

[11] The assumptions by the courts in *Albertson's* and *Boise Cascade* that base prices would be raised if freight prices were lowered is supported by the record in this case, which indicates that prices did *not* drop when the West Coast freight system was abandoned. Vol. 56, Tr. 3168-70. Base prices necessarily must have been revised in order to compensate for the lowered freight rates. *Cf. In re Folding Carton Antitrust Litigation*, 83 F.R.D. 251, 254 (N.D.Ill. 1978) ("If an economically effective price conspiracy takes place over a long period of time and the industry suddenly becomes competitive, then profits and prices are expected to fall.").

conspiracy to fix one element alone is a *per se* violation of the Sherman Act. *Catalano* did not directly address the issue presented by this petition: whether damages in such cases can be measured solely by considering the single element. Nevertheless, this Court implicitly recognized that the damages to purchasers under the alleged agreement to eliminate credit terms would not automatically equal the amount of the credit eliminated: "[I]t may be that the elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price [*i.e.*, purchase price]." *Id.* at 648-49. The fact that agreements such as those alleged in *Catalano* and this case may have diverse economic results should preclude the "all or nothing" rule adopted in this case.

In *J. Truett Payne Co.* v. *Chrysler Motors Corp., supra,* the Court rejected an "automatic damages" standard under the Robinson-Patman Act, holding that the amount of the price discrimination did not automatically equal the amount, if any, by which the plaintiff had been injured. Rather, the Court insisted that the "plaintiff must make some showing of actual injury" (451 U.S. at 562), a burden not satisfied merely by the testimony of plaintiff's expert that some harm must have resulted. The one-element damage formula at issue here is as arbitrary and unconnected to plaintiffs' actual injury as was the formula in *J. Truett Payne.*[12]

---

[12] *See also Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 52-53 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972) (measure of damages for illegal tie-in could not be based upon the price rise of tied item alone, but must include consideration of tying item); *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra,* 603 F.2d at 297-98 (measure of damages for monopolization limited to effect of defendant's wrongful acts rather than the difference between monopoly price and competitive price, since monopoly was lawfully acquired); *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied,* 369 U.S. 865 (1962) (damage evidence "convey[ed] a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it"); *Union Carbide and Carbon Corp.* v. *Nisley,* 300 F.2d 561, 576-84 (10th Cir.), *cert. dismissed,* 371 U.S. 801 (1962) (relevant economic factors including existence of negotiated prices must be considered in

footnote continued on following page

The Fifth Circuit's Failure To Analyze The Issue. The above authorities uniformly recognize that a deceptively simple formula for computing damages must be closely scrutinized to ensure that it accurately reflects the true amount of injury sustained by the plaintiffs. By contrast, the opinion of the Fifth Circuit, upholding the measure of damages in this case, does not withstand analysis.

Dismissing the issue of whether the evidence supported the jury's verdict on measure of damages with the facile observation that "[t]he jury chose to accept the testimony of plaintiffs' economist and to reject the contrary testimony of defendants' economist" (655 F.2d at 635, App. at A-11), the Fifth Circuit skirted the issue raised by this petition—the propriety of a one-element measure of damages. Instead, the Fifth Circuit (in the context of rejecting the claim that submission of the issue to the jury was improper) devised an ill-conceived "estoppel" argument:

> "Defendants tried to convince the jury that their pricing system caused no economic injury to anyone. The jury, agreeing with plaintiffs and disagreeing with defendants, returned its special verdict upholding plaintiffs' theory. Having failed to persuade the first jury that their challenged practices caused damage to no one, defendants now seek the opportunity to convince a different jury that some other measure of damages is appropriate." (655 F.2d at 636, App. at A-11).

---

footnote continued from previous page

determining damages); *Jacobi* v. *Bache & Co.*, 377 F.Supp. 86, 93 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) (measure of damages for conspiracy to eliminate one element of commission payments must include consideration of other elements); *ILC Peripherals* v. *IBM Corp.*, 458 F.Supp. 423, 434-36 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp.* v. *IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 3126 (1981) (damage evidence rejected as speculation where there was a failure to separate effects of lawful from unlawful competition); *Wall Products Co.* v. *National Gypsum Co.*, 357 F.Supp. 832, 836-37 (N.D.Cal. 1973) (multitude of factors considered in determining amount of overcharge, including decline in price level after conspiracy, supply and demand, industry capacity, comparison of freight rates, etc.).

This argument hopelessly confuses *measure* of damages with a preliminary and distinct question: *fact* of damage (*i.e.*, "impact") to plaintiffs. The issue of whether members of the class have been injured at all by the challenged practices is quite separate from the issue of how those damages are to be measured, some injury being assumed. The Fifth Circuit ignored this distinction. Under its analysis, defendants cannot contest any *measure* of damages proposed by plaintiffs, however speculative or improper, if the defendants also opposed the finding of *fact* of damage. This reasoning confuses two distinct concepts, and creates a dangerous precedent barring antitrust defendants' rights to contest damage evidence.

Moreover, the Fifth Circuit incorrectly characterized the measure of damages issue as dependent upon the jury's belief as to the relative credibility of the parties' experts. Petitioner does not ask this Court to weigh credibility, or to sift conflicting evidence on what the "competitive" delivered price of plywood should have been; we recognize that such is not this Court's function. Plaintiffs' expert did not consider any factor other than freight, and the trial court's interrogatories allowed the jury to consider no other factor.[13] Thus, this case presents a clear legal issue which this Court must resolve: whether a measure of damages properly can be based on consideration of only one variable in the price of a product.

B. The Trial Court's Failure To Instruct The Jury On Measure Of Damages Was Reversible Error.

Even if this case presented no other issues of overriding importance, and no conflicts between the circuits, the trial court's failure to instruct the jury on the proper measure of damages would warrant the grant of certiorari and summary reversal.

---

[13] These interrogatories were given to the jury despite petitioner's objection, *inter alia*, that the correct measure of damages was the difference between the actual price paid for plywood and the price if the challenged practice had not existed. Vol. 56, Tr. 3572-74.

The trial court's submission of the "all or nothing" damage interrogatories is even more remarkable in light of the fact that the court later stated it did not "necessarily agree" with the jury's finding that plaintiffs were damaged in the full amount of the freight differential. 1979-1 CCH Trade Cas. at 76,698; App. at C-4.

The Federal Rules recognize the particular importance of proper explanation by the trial court when special interrogatories are submitted: "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Rule 49(a), F.R.Civ.P.[14] At a minimum, the trial court should have instructed the jury that the freight element and the standard weights could not be considered in isolation, but merely as part of the overall price, and that the measure of damages had to be based upon the amount by which that overall price was raised by the alleged conspiracy.[15]

The Fifth and the Ninth Circuits have reached conflicting results on the issue of whether the freight pricing system adopted by the industry had any effect on the total price ultimately paid by plywood purchasers. But the conflict between the decisions below and *Boise Cascade* goes far deeper than a mere disagreement over a particular factual issue. The

---

[14] *See also Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 498 (1980) (reversible error for trial court to fail to instruct jury regarding factor to be discounted in computing damages); *Landy* v. *FAA*, 635 F.2d 143, 147 (2d Cir. 1980) ("Because the jury below was left completely at sea concerning the applicable legal standards, its findings did not constitute a proper and adequate factual basis for the fine imposed."); *Chagas* v. *Berry*, 369 F.2d 637, 641 (5th Cir. 1966), *cert. denied*, 389 U.S. 872 (1967) (failure by trial court in fraud case to instruct jury on proper measure of damages was reversible error).

[15] Failure to instruct the jury only compounded the trial court's error in even submitting the issue to the jury. The trial court, by a pretrial order entered in March 1978, "severed for subsequent trial as appropriate . . . amount of damages sustained by individual plaintiffs, intervenors and class members." ¶ 10(d), Supp.Vol. 35, 20416-17. Petitioners reasonably understood this to mean that measure of damages would not be tried in the liability phase of the litigation.

As the trial court subsequently acknowledged, petitioners reasonably equated "measure" with "amount" of damages, at least for purposes of the bifurcation order: "It may very well be and the Court has no reason to doubt [the] sincerity of defense counsel in equating those two terms." Vol. 59, Tr. 656.

trial court's submission failed to instruct the jury to consider the very principle which the Ninth Circuit found dispositive in this case: the probability that plywood sellers would raise their base price to correspond to a hypothetical decrease in freight.

We recognize that two fact-finders considering the same evidence may come to different results, because they have drawn different conclusions from the same facts. But that is not what happened here. The differing results flow not from different factual inferences drawn by different fact-finders, but because one of the two fact-finders—the jury in the proceedings below—was not given a correct legal standard against which to measure the evidence.

Several fundamental errors combined to result in this erroneous measure of damages: *first*, the trial court's failure to instruct the jury concerning the appropriate standards for measuring antitrust damages; *second*, its submission of special interrogatories which did not permit consideration of more than a single element of the price; and *third*, its *sua sponte* submission of the damage issue to the jury, contrary to the reasonable expectations of the defendants.

The issue presented here is simply whether a verdict may be rendered by a jury which has never been instructed to consider the applicable legal standard governing antitrust damages, and whose consideration of the question of damages was framed by interrogatories which improperly singled out one element affecting price (the difference between charged and actual freight) without requiring or even inviting consideration of other relevant factors. No verdict of any size—let alone one of this magnitude—should be based on such a procedure, and the Fifth Circuit's decision to the contrary should not be allowed to stand.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

DATED: March 2, 1982

Respectfully submitted,

FREDERICK P. FURTH
(Counsel of Record)
THOMAS R. FAHRNER
DANIEL S. MASON
MICHAEL P. LEHMANN
CRAIG C. CORBITT
FURTH, FAHRNER, BLUEMLE & MASON
201 Sansome Street, Suite 1000
San Francisco, California 94104
Telephone: (415) 433-2070

Attorneys for Petitioner Georgia-Pacific Corporation

Of Counsel:
JAMES M. NICHOLSON
THOMAS E. WITHYCOMBE
WILLIAM E. CRAIG
GEORGIA-PACIFIC CORPORATION
900 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 222-5561

ADDENDUM

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE PLYWOOD ANTITRUST LITIGATION	MDL Docket No. 159

EXCERPTS FROM THE TRIAL TRANSCRIPT NOVEMBER 14, 1978

I.
(Vol. 56, pp. 3536, line 1 through 3542, line 7)

THE COURT: (Continuing:) Now, there are some items of evidence that I want to comment upon because in your decision as to whether or not there was a conspiracy, contract here calling for these practices you will be looking at both direct evidence and circumstantial evidence. I have already explained earlier both what circumstantial is and how both circumstantial and direct evidence may be and are due to be considered by you in making your decision. I want to talk for a few minutes about some of the evidence in the case that may have some bearing on this decision of yours. I do so primarily for illustration and to give some greater understanding, perhaps, as to how that might relate to your decision.

There has been evidence of manufacturers talking with one another, obtaining pricing information from one another, buying from one another, including long term contracts. These practices, these transactions, these contacts in and of themselves are not illegal. Indeed, they may be vehicles for fostering competition. At the same time, such matters may also be conduct that, when viewed on their own and in the light of the

other evidence, indicate that there were agreements, expressed or implied, reached between manufacturers that they would use in selling plywood to others West Coast freight or standard weights. In short, although you should understand that when one manufacturer buys from another that is a contract, that contract in and of itself is not a violation of the Sherman Antitrust Law unless that contract involves and places a requirement that there will be in the resale of that product the use of West Coast freight or standard weights.

Now, the fact that manufacturers attended trade meetings, participated in trade discussions, likewise, in and of itself is not illegal under the Sherman Antitrust Act and, indeed, may be evidence or a means for fostering competition. On the other hand, such evidence is evidence that there was some opportunity for persons to have agreed or to have gotten together to assure that some previously agreed upon matter was being carried out. I, of course, would call to your attention that the mere fact that there be opportunity to meet or to agree does not mean that any particular agreement was or was not entered. It is merely one part of the total of the circumstantial evidence that you will be dealing with.

For example, it has been shown that the Plaintiffs or some of the Plaintiffs in this area were members of a trade association themselves, and that, as I say, going back to the question about the Defendants, is nothing illegal at all about that. There is nothing wrong in and of itself with either trade association or with going to trade meetings, but it is part of the facts, the circumstantial evidence which you are going to be called upon to make the decisions you are.

Now, there is evidence that plywood prices fluctuate, perhaps widely, and that there was competition among manufacturers in the selling of plywood. Now, those matters, if they be true, would not in and of themselves mean that there was no contract or conspiracy to use West Coast freight or standard weights. There is nothing that says that a conspiracy, for example, to restrain competition must restrain all competition. If there is a conspiracy to restrain certain aspects of competition, that is still against the law, against Section 1 of the

Sherman Antitrust Act. On the other hand, evidence of competition in other areas is a part of the circumstantial evidence that you will be considering in considering well, nevertheless they would have agreed to have established a particular form of price or to use particular restraints on competition. It will be a part of the total evidence in the case.

As I have indicated earlier, the fact that many or all manufacturers were to adopt the same or similar practices would not in and of itself mean that there was a conspiracy to do so. This would be true even if it were shown that they did so knowing that others were following similar practices. On the other hand, where it be a fact that similar practices are being followed by many manufacturers, with each being aware that the other is doing so, that is a part of the circumstantial evidence from which a jury may, with other evidence in the case, look to see whether this was so because of some agreement to do so.

In considering whether or not to draw any such inference, you would want to consider whether the different manufacturers adopting such practices were doing so because of their own independent best judgment as to what was in their best economic interest to do so, independent of any commitment or agreement from other people to do the same thing. In deciding this issue and in deciding what inference, if any, to draw, you would want to consider whether the practices that were being employed made sense in the light of the economic industry conditions and whether or not the benefits from those practices, continuation of those practices, were or were not dependent on other people, other manufacturers doing the same thing. You would want to consider whether those practices were, on the one hand, arbitrary and artificial and unduly complicated or, on the other hand, were helpful and useful and convenient.

Now, the mere fact, if it be a fact, that some practice was being followed that was artificial or arbitrary or unduly complicated, that fact in and of itself would not mean that it was a product of a conspiracy any more than would the fact, if it be a fact, that the practices were logical and convenient and helpful

indicate that there wasn't a conspiracy. These would simply be factors that you would take into consideration in the totality of the evidence in deciding whether or not to draw the inference that these matters came about not as a result of the decision by the individual companies that it was in their best interest to do so, but whether they did so because of some expressed or implied commitment and agreement from others to do likewise.

I do call your attention to the fact that you are not called into this case to pass judgment on whether the practices of the manufacturers were wise practices or were fair practices. That is not what you are called upon to decide. You might conclude that they were or they weren't. What you are called upon to do is to decide whether these practices were or were not the product of contract, combination or conspiracy as I have defined that.

II.

(Vol. 56, pp. 3552, line 1 through 3556, line 9)

THE COURT: (Continuing:) Now, you will note that there are questions 2 and 4, and I haven't gone into those yet, nor have I really touched upon them in these instructions. I started off this second part of the instructions by saying that there are two elements in the claims that the Plaintiffs make against the Defendants and that they have a burden of proving each of the elements to your reasonable satisfaction. Because they must not only prove that West Coast freight, standard weights, were a result of a contract, combination or conspiracy but they must also prove to your reasonable satisfaction that these practices had a financial damage, caused financial damages to the people that bought plywood, the Plaintiffs and the other class members. Now, the Plaintiffs obviously are asking and insisting that you answer yes to questions 2(a) and 4(a). The Defendants are saying that you should answer no to those questions, that the Plaintiffs have not proved that, and that your decision then ought to be no.

The questions I think are easy to understand and really don't require that much explanation. 2(a), did the use of West Coast freight in the pricing of southern pine plywood during the period from February 23, 1968 to December 31, 1973 cause financial damage to the purchasers of such plywood, answering either yes or no.

You have a similar question on 4(a). It asks the same question but with respect to the use of standard weights, as to whether the use of standard weights during that period of time caused financial damage to the people buying western fir plywood.

Now, and again, the Plaintiff [sic] in asking that you answer that yes has a burden to persuade you to answer yes to that. The Defendants are asking you to answer no to that. If you conclude that, yes, the use of southern—of West Coast freight or of standard weights or both did cause damage to the people who bought southern pine plywood and western fir plywood respectively, you are then asked to go on to these questions 2(b) and 4(b), and that is to say whether the damage that was caused to the purchasers is, as the Plaintiffs contend in the case of West Coast freight, the difference between the West Coast freight and the actual freight. Plaintiffs are saying that in the pricing of southern pine plywood that there was damage caused to people who bought that southern pine plywood to the extent of the difference between the West Coast freight and the actual freight.

Now, actually you will remember that there is some evidence in the case that not in all cases was the manufacturer involved in the shipping of the plywood to a particular purchaser's destination but that on some of those that there was an actual pickup in some way by the purchaser at the mill sight [sic], for example, or the purchaser arranged for his own transportation, and that in those situations there was some allowance given off of the price for picking it up rather than the manufacturer paying the freight charges. Now, in those

situations the Plaintiffs would say that the actual damage caused was the difference between the West Coast freight and this allowance that was given as a deduction against the price.

So in question 2(b), if you have answered 2(a) yes, you are to go on forward and say whether the Plaintiffs are correct in their contention that the amount of damage that was sustained by purchasers was equal to the difference between the West Coast freight and the actual freight or the allowance given for picking up or handling their own freight. The Plaintiffs are asking that you answer yes to that question. The Defendants are saying that—of course they are saying you shouldn't have to get to that question at all, but they are also saying answer no if you do get to that question.

4(b) is of a similar form; that is, it is saying that if you have decided that there was damage caused by the use of standard weights, damage to the purchasers of western pine plywood, then was that damage equal to the amount by which freight calculated on the basis of the standard weight or estimated weight or association weight, whatever you want to call it, exceeded the freight that was actually paid. The Plaintiffs say that is the amount by which the purchasers of western pine plywood were damaged, the difference between a freight calculation based on these estimated or standard or association weights and, on the other hand, the actual freight incurred. Here again, the Plaintiffs ask that you answer yes to that, and the Defendants say, Number One, that you shouldn't have to get to that point but if you do you should answer no.

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FREDERICK P. FURTH
(Counsel of Record)
THOMAS R. FAHRNER
DANIEL S. MASON
MICHAEL P. LEHMANN
CRAIG C. CORBITT
FURTH, FAHRNER, BLUEMLE & MASON
201 Sansome Street, Suite 1000
San Francisco, California 94104
Telephone: (415) 433-2070

Attorneys for Petitioner Georgia-Pacific Corporation

Of Counsel:
JAMES M. NICHOLSON
THOMAS E. WITHYCOMBE
WILLIAM E. CRAIG
GEORGIA-PACIFIC CORPORATION
900 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 222-5561

TABLE OF CONTENTS*

	PAGE
TABLE OF AUTHORITIES	ii
I. CONSPIRACY ISSUES	1
Question 1	1
Question 2	4
II. DAMAGE ISSUES	5
Question 3	5
Question 4	7

* The subsidiaries and affiliates of Georgia-Pacific Corporation are listed in the "Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit," dated March 2, 1982.

TABLE OF AUTHORITIES

CASES — PAGE

Berkey Photo, Inc. v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) 7

Boise Cascade Corp. v. *FTC*, 637 F.2d 573 (9th Cir. 1980) 6

Borger v. *Yamaha Int'l Corp*, 625 F.2d 390 (2d Cir. 1980) 2

Catalano, Inc. v. *Target Sales, Inc.* 446 U.S. 643 (1980) 3, 6

Clappier v. *Flynn*, 605 F.2d 519 (10th Cir. 1979) 6

E. I. du Pont de Nemours & Co. v. *Berkley & Co., Inc.*, 620 F.2d 1247 (8th Cir. 1980) 2

Hayes v. *Solomon*, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) 2

Huddleston v. *Herman & MacLean*, 640 F.2d 534 (5th Cir.), *modified*, 650 F.2d 815 (5th Cir. 1981), *petitions for cert. pending* (Nos. 81-680, 81-1076) 6

In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981) 4

Joseph E. Seagram & Sons, Inc. v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) 2

Neely v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967) 4

Proctor v. *State Farm Mut. Automobile Ins. Co.*, No. 80-2437 (D.C. Cir., Mar. 16, 1982) 4

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962) 2

Turchio v. *D/S A/S Den Norske Africa*, 509 F.2d 101 (2d Cir. 1974) 6

United States v. *Cooper*, 567 F.2d 252 (3d Cir. 1977) 5

United States v. *Dunn*, 564 F.2d 348 (9th Cir. 1977) 5

United States v. *Lovasco*, 431 U.S. 783 (1977) 4

United States v. *Malatesta*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 440 U.S. 962 (1979) 5

Venzie Corp. v. *United States Mineral Prods. Co.*, 521 F.2d 1309 (3d Cir. 1975) 4

Weit v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (Mar. 1, 1982) (No. 81-152) 4

No. 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Georgia-Pacific Corporation respectfully submits this reply brief in support of its petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit.

This case presents clear and fundamental issues of antitrust law which require this Court's attention. Although respondents seek to frame the issues in terms of sufficiency of the evidence, in fact, other than the slight evidence rule issue discussed in Question 2, this Court need not examine the evidence in order to decide the questions presented by Georgia-Pacific's petition.

I.

CONSPIRACY ISSUES.

Question 1:

Contrary to respondents' suggestion, the issue here is not whether a correctly instructed jury properly could have found a

conspiracy from the evidence presented at trial. Rather, the issue is whether the correct legal standard for inferring an antitrust conspiracy was supplied to the jury by the trial court, and applied by the Fifth Circuit in affirming the judgment.

Even if it is assumed, for purposes of argument only, that the evidence was sufficient to support the verdict under a *correct* instruction of the law of conspiracy (had one been given), it is impossible to tell whether or not the jury reached its finding based upon evidence of anything more than conscious parallelism plus opportunity contacts. Since "it is impossible to tell which path the jury followed in reaching its verdict," the verdict cannot stand. *Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390, 398 (2d Cir. 1980).[1] Accordingly, respondents' discussion of the evidence is irrelevant to the question this Court is asked to consider.

Instead of directly addressing this legal issue of the scope of conspiracy law, respondents have resorted to two incorrect characterizations of the record.

First, respondents assert that the jury *was* correctly instructed that evidence of parallel business conduct, combined with opportunity contacts, is not sufficient proof from which a conspiracy may be inferred:

> "This is not a case in which conspiracy was inferred from evidence of parallel business conduct, either alone *or combined with communications affording only an opportunity to conspire. In fact, the jury was specifically instructed*

---

[1] *Accord, Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *E.I. du Pont de Nemours & Co.* v. *Berkley & Co., Inc.*, 620 F.2d 1247, 1256-57 (8th Cir. 1980); *Hayes* v. *Solomon*, 597 F.2d 958, 985-86 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) ("Despite the use of the jury interrogatories, the very real likelihood that the jury may have utilized an unproven or improper theory of liability to reach its verdict mandates reversal"); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

> *that such evidence is not in itself sufficient* to sustain an inference of conspiracy." (Resp. Br. at 5; emphasis added.)[2]

Under any fair reading of the instructions, this contention is nonsense. While the trial court arguably did tell the jury that neither conscious parallelism alone nor the existence of opportunity contacts alone is enough to support an inference of conspiracy[3], it did *not* explain that the combination of the two is likewise insufficient as a matter of law. The trial court's error of omission was compounded by its instruction that both conscious parallelism and opportunity contacts are pertinent circumstantial evidence of conspiracy. Vol. 56, Tr. 3539-40.

Second, respondents state that "this is not a 'single element' price fixing case." Resp. Br. at 5. This contention is easily answered by review of the Special Verdict interrogatories (Pet.App. I) and the corresponding jury instructions (Pet. Addendum at d-f), from which it is apparent that the only conspiracies charged were with respect to West Coast freight and standard weights. Respondents have never contended until now that any single element of the total price other than freight was artificially raised. This is a true "single element" case, like *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

---

[2] *See also* Resp. Br. at 7. The Brief of Respondents in Opposition to Petition for Writ of Certiorari is referred to as "Resp.Br. at ____"; petitioners' Joint Appendix is referred to as "Pet.App. ____"; the Petition for Writ of Certiorari of Georgia-Pacific is referred to as "Petition of Georgia-Pacific at ____"

[3] The instructions were sufficiently ambiguous that the jurors might have concluded that they were free to return a verdict of liability on conscious parallelism *or* opportunity contacts alone. For example:

> "[T]he mere fact that there be opportunity to meet or to agree does not mean that any particular agreement was *or was not* entered. It is merely one part of the total evidence that you will be dealing with." (Vol. 56, Tr. 3538, Addendum to Petition of Georgia-Pacific at b; emphasis added.)

While this instruction fairly told the jury that a finding of conspiracy was not *compelled* by evidence of opportunity contacts alone, the converse was not apparent; *i.e.*, the jurors may have understood that such evidence would suffice if they so chose.

A verdict that the freight element was conspiratorially fixed can only properly be based upon evidence of agreement concerning that element. Under the standards set by the Third and Seventh Circuits in *Venzie Corp.* v. *United States Mineral Prods. Co.*, 521 F.2d 1309 (3d Cir. 1975), and *Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (Mar. 1, 1982)(No. 81-152) (and now by the District of Columbia Circuit in *Proctor* v. *State Farm Mut. Automobile Ins. Co.*, No. 80-2437 (D.C. Cir., Mar. 16, 1982)), this evidence must consist of more than conscious parallel conduct plus discussions on other subjects showing only an opportunity to conspire on the element in question. The error below consists of the trial court's failure to so instruct the jury, plus the Fifth Circuit's application of a lesser standard of proof than that demanded by the Third, Seventh and District of Columbia Circuits. Respondents' lengthy description of evidence, which at best supports the Fifth Circuit's incorrect legal standard of inferring a conspiracy from "parallel pricing conduct . . . plus the numerous items of direct evidence of communication between high-level personnel on pricing policy" (*In re Plywood Antitrust Litigation*, 655 F.2d 627, 634 (5th Cir. 1981), Pet.App. at A-9), is thus inapposite.

Question 2:

Petitioner adequately preserved its right to raise the "slight evidence" issue to this Court, by objecting at several points in the proceedings below to the sufficiency of the proof tying absent parties to the conspiracies. Vol. 56, Tr. 3571; "Joint Memo. In Support of Motions for J.N.O.V. and a New Trial," pp. 50-51 (Dec. 5, 1978); "Brief of Appellants" to the Fifth Circuit, p. 53 (Aug. 13, 1980). The issue is thus appropriately raised to this Court.[4]

Respondents' contention that "direct, substantial evidence linked the [absent] co-conspirators to the conspiracy" (Resp. Br. at 20) is likewise without merit. As stated in the Petition of Georgia-Pacific at 17, for the vast majority of absent co-conspirators, the linking evidence consisted solely of parallel

[4] Even were there any doubt regarding sufficiency of the objections below, this Court may still consider the issue. *See, e.g., United States* v. *Lovasco*, 431 U.S. 783, 788, n.7 (1977); *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 330 (1967).

conduct.[5] Indeed, since the trial court expressly relied *solely* upon conscious parallel conduct in holding that all of these absent parties were properly included in the conspiracies (Pet.App. at C-3), the issue of whether this unprecedented extension of the slight evidence rule was proper is squarely before this Court.[6]

II.

DAMAGE ISSUES.

Question 3:

Despite respondents' implication to the contrary (Resp.Br. at 10), the jury was not instructed to base its damage findings upon consideration of the *total* delivered price of plywood, including the mill price. Instead, the trial court's special interrogatories and instructions focused only upon freight, the single price element which allegedly was fixed. Respondents' citation of evidence which purportedly demonstrates that delivered prices were raised by the entire amount of the freight "overcharge" is thus irrelevant; the issue is not whether such evidence exists, but whether it was proper to base the damage determination upon consideration of only one element, rather than the total price. Respondents' insistence that the alleged conspiracy increased total delivered prices (Resp.Br. at 11), only underscores the impropriety of the submission of the damage issue to the jury in a manner which permitted consideration of only the single element.

---

[5] Apart from legitimate sales agreements among the plywood companies and mere participation at functions of the American Plywood Association—neither of which constitutes "slight evidence" (Petition of Georgia-Pacific at 18 n.10)—there was no evidence of communications and, indeed, no evidence other than conscious parallelism, for nine of 16 defendants with respect to the alleged West Coast freight conspiracy and 23 of 35 defendants with respect to the alleged standard weight conspiracy.

[6] Respondents' assertion that the slight evidence rule "is correct and uniform" (Resp.Br. at 19) is wrong. At least three circuits, including the Fifth, have rejected or modified the rule in recent years. *United States* v. *Malatesta*, 590 F.2d 1379, 1383 (5th Cir.), *cert. denied*, 440 U.S. 962 (1979) (rejected); *United States* v. *Cooper*, 567 F.2d 252, 253 (3d Cir. 1977) (rejected); *United States* v. *Dunn*, 564 F.2d 348, 357 (9th Cir. 1977) (modified to require "sufficient" evidence of knowing participation in the conspiracy).

Respondents' contention that petitioners failed to object below to the submission of the measure of damage interrogatories to the jury (Resp.Br. at 18-19) is incorrect. The issue was properly raised both to the trial court and to the Fifth Circuit. Vol. 56, Tr. 3573; "Brief of Appellants" to the Fifth Circuit, pp. 75-79 (Aug. 13, 1980).[7] Moreover, it is not necessary to propose a specific alternative interrogatory, as respondents suggest, in order to preserve the issue for appeal; it is sufficient to object to the proposed interrogatory prior to its submission to the jury, as petitioners did. *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 550 (5th Cir.), *modified in part on other grounds*, 650 F.2d 815 (5th Cir. 1981), *petitions for cert. pending* (Nos. 81-680, 81-1076); *Clappier* v. *Flynn*, 605 F.2d 519, 528 (10th Cir. 1979); *Turchio* v. *D/S A/S Den Norske Africa*, 509 F.2d 101, 105 (2d Cir. 1974).

Respondents also mischaracterize petitioners' reliance upon *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980) and this Court's opinion in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 649 (1980). Petitioner does not suggest that this Court must assume that the "freight gain" was completely offset by lower mill prices (Resp.Br. at 11); it does suggest that the *opposite* cannot be assumed either, *i.e.* that the "freight gain" was completely absorbed as profit, with the mill price remaining unchanged. *Neither* extreme should be automatically assumed—that is precisely the problem with the measure of damage interrogatories, which assume that one extreme or the other must be correct. *Catalano* recognizes that such all-or-nothing assumptions are improper in a single-element case.[8]

---

[7] Section II.C of the petitioners' opening brief to the Fifth Circuit was entitled: "It Was Also Reversible Error To Submit Freight Differentials, Or 'Phantom Freight,' To The Jury As The Measure Of Damages. That Formula May Not Be Used In A Class Action Of This Type And Was Barred By The Law Of The Case."

[8] Respondents' further ground for distinguishing *Catalano*—that "this was not a competitive market" (Resp.Br. at 12)—is specious. Damages in price-fixing cases are measured by comparison of the actual price charged with the hypothetical price in a competitive market; the competitive price thus becomes relevant even when a conspiracy is established. The only proper way to measure damages in this case is by comparing the difference, if any, between actual delivered prices and prices in a "competitive" market.

Question 4:

Having propounded interrogatories which allowed for no intermediate alternative measure between the two extremes offered, the trial court compounded the error by *giving the jury no instructions whatsoever* concerning the appropriate standards for measuring damages in antitrust cases. Specifically, the trial court failed to instruct the jury that damages in a price-fixing case must be based upon the difference between the total price paid and what the total price would have been absent the conspiracy. *See Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). It is undisputed that no such instruction was given; the fact is obvious from a cursory review of the instructions. Addendum to Petition of Georgia-Pacific at d-f. Respondents have not addressed this issue. The error in this aspect of the case is so obvious and so fundamental that it alone warrants the grant of certiorari and summary reversal.[9]

---

[9] For the reasons explained above, there is no need to discuss the evidence in this case. However, in their zeal to frame the issues in evidentiary terms, respondents unfortunately have resorted to numerous mischaracterizations and misstatements of the record. One (all too typical) example will suffice. At page 9 of their opposition, the respondents state that "Weyerhaeuser and Georgia-Pacific had no legitimate business dealings together *and did not buy or sell plywood to each other,*" (emphasis added) citing, *inter alia*, pages 341 and 451 of the trial transcript. At page 341, the following deposition testimony of Mr. James Tweedie of Weyerhaeuser was read into the record by Harold Kohn, Esq., counsel of record for the respondents in this Court:

"Q. Was Weyerhaeuser buying plywood from Georgia-Pacific at that time?

"A. Some, yes."

And the following testimony of Mr. Tweedie was read at page 451:

"Q. Do you have any knowledge that Weyerhaeuser bought plywood on any basis from Georgia-Pacific?

"A. Not any specific details, but I am aware that they have bought plywood from time to time."

Petitioner does not suggest that the above exchange has any relevance to the questions before this Court. It is cited only as an example of the cavalier manner in which respondents have characterized the record.

DATED: April 7, 1982

Respectfully submitted,

FREDERICK P. FURTH
(Counsel of Record)
THOMAS R. FAHRNER
DANIEL S. MASON
MICHAEL P. LEHMANN
CRAIG C. CORBITT
FURTH, FAHRNER, BLUEMLE & MASON
201 Sansome Street, Suite 1000
San Francisco, California 94104
Telephone: (415) 433-2070

Attorneys for Petitioner Georgia-Pacific Corporation

Of Counsel:
JAMES M. NICHOLSON
THOMAS E. WITHYCOMBE
WILLIAM E. CRAIG
GEORGIA-PACIFIC CORPORATION
900 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 222-5561

SUPREME COURT, U.S.
FILED
MAR 8 1982

No. 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner

v.

LYMAN LAMB COMPANY, PLYWOODS DISTRIBUTING COMPANY, BATON ROUGE LUMBER COMPANY, CITY OF ARKADELPHIA, ARKANSAS, *et al.*,
Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY T. KALBCZYC
(Counsel of Record)
STEPHEN A. BOKAT

National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3180

NO. 81-1619-CFX	TITLE Georgia-Pacific Corporation, Petitioner
VIDE: 81-1618	v. Lyman Lamb Company, et al.

DOCKETED	COURT
Mar. 2, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Frederick P. Furth
	Counsel for Respondents: Harold E. Kohn, Dale E. Fredericks, Herbert J. Garon
Mar. 2, 1982	Petition for writ of certiorari filed. (Record filed).
Mar. 2, 1982	Appendix filed.
Mar. 8, 1982	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
March 11, 1982	Motion of The Business Rountable for leave to file a brief as amicus curiae filed. (Vide: 81-1618).
March 11, 1982	Motion of National Association Manufacturers for leave to file a brief as amicus curiae filed. (Vide: 81-1618).
March 22, 1982	Response of Lyman Lamb Company, et al. to the motions of the Chamber of Commerce of the United States, The National Association of Manufacturers, The Business Roundtable, et al, for leave to file briefs amicus curiae filed. (Vide: 81-1619).
March 31, 1982	Brief for the respondents in opposition field. (Vide: 81-1618).
Apr. 7, 1982	Reply brief for the petitioner filed.
Apr. 7, 1982	DISTRIBUTED. 4-23.
Apr. 14, 1982	Supplemental brief of respondents in opposition filed. (D). (Vide: 81-1618).
Apr. 27, 1982	DISTRIBUTED. 4-30.
May 10, 1982	REDISTRIBUTED. 5-13.
May 17, 1982	The motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae is GRANTED. The motion of The Business Roundtable for leave to file a brief as amicus curiae is GRANTED. The motion of National Association of Manufacturers for leave to file a brief as amicus curiae is GRANTED. The motion of Bowie-Sims-Prange, Inc., et al. for leave to file a brief as amici curiae in No. 81-1618 is GRANTED. Petition GRANTED. The case is consolidated with 81-1618 and a total of one hour is allotted for oral argument. White and O'Connor, JJ., OUT.

June 8, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Aug. 16, 1982.

(Over)

No. 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner

v.

LYMAN LAMB COMPANY, PLYWOODS DISTRIBUTING COMPANY, BATON ROUGE LUMBER COMPANY, CITY OF ARKADELPHIA, ARKANSAS, *et al.*,
Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States (or "Chamber"), pursuant to Rule 36.1 of the Rules of this Court, hereby moves for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari,[1] and in support of its motion states:

1. The Chamber is the largest federation of corporations, trade associations, chambers of commerce and individuals engaged in business and the professions, with an aggregate membership in excess of 200,000.

2. The Chamber regularly presents its views to this Court and the lower federal courts on a number of public

[1] This motion is necessitated by the failure of the Respondents to consent to the filing of the brief; the Petitioner has given its consent.

policy issues of concern to the business community, including matters of antitrust law.[2]

3. The instant case presents a unique question concerning the proper method of calculating damages in private antitrust litigation which the Chamber believes merits review by this Court. In the area of antitrust law, no less than in any other area of the law, predictability is obviously desirable. Because the charge of the district judge to the jury concerning the method of computing damages and the jury's special verdict that the defendants are liable for damages (Appendix I) represent a departure from established principles of antitrust damages computation, this decision will remain as an unfortunate cloud upon litigants' ability to predict, at as early a stage as practicable, the amount of the potential recovery. This case cannot be dismissed merely as an anomaly which will neither be noticed nor followed by other courts. The magnitude of the potential class recovery itself at the same time magnifies both any perceived inadequacies in the courts' opinions and the likelihood that the opinions will be followed. Since the opinions below permit private antitrust litigants to focus upon one element of the price of a product, without regard for the total price, in assessing damages, then this case can only be viewed as a harbinger of increasingly larger judgments which are premised upon theories which, the Chamber believes, are at variance with the basic purpose and goals of the antitrust laws. And, the Chamber believes, the decisions of the lower courts here create precisely that type of uncertainty as to the determination of the amount of actual damages which is inappropriate when that amount can be trebled. As previously stated, Supreme Court review is appropriate to

---

[2] *U.S.* v. *U.S. Gypsum*, et al. 438 U.S. 422 (1978); *First National Maintenance Corp.* v. *NLRB* ____ U.S. ____, 69 L.Ed2d 318 (1981); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute* 448 U.S. 607 (1980); *Gould Corp.* v. *NLRB*, 612 F.2d 728 (3rd Cir. 1979); *Kouba* v. *Allstate*, No. 81-8131 (9th Cir.).

resolve this uncertainty now, rather than await future, perhaps equally troubling, applications of the principles of damage calculation which are both explicit and implicit in the decisions below.

WHEREFORE, the Chamber respectfully requests that its motion be granted.

Respectfully submitted,

STANLEY T. KALECZYC, ESQ.
(Counsel of Record)

STEPHEN A. BOKAT, ESQ.

National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3180

Counsel for the Chamber of
Commerce of the United States

TABLE OF CONTENTS

		Page
I.	Statement Of Interest	1
II.	Reasons For Granting The Writ	1
III.	Conclusion	7

TABLE OF AUTHORITIES

	Page
CASES	
Berkey Photo, Inc. v. *Eastern Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979)	5,6
Boise Cascade Corp. v. *Federal Trade Commission*, 637 F.2d 573 (9th Cir. 1980)	3
Chattanooga Foundry & Pipe Works v. *City of Atlanta*, 203 U.S. 390 (1906)	4
In Re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981)	3,6
Payne v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981).	4
Pfizer Inc. v. *Government of India*, 434 U.S. 308 (1978)	6
STATUTES	
Clayton Act, 15 U.S.C. §12 et. seq.	*passim*
MISCELLANEOUS	
Adams and Bock, *Damages in Horizontal Price Fixing Cases*, 49 Antitrust Law Journal 141 (1980)	4
P. Areeda and D. Turner, *Antitrust Law* (1978)	6,7
Goetz, *The Basic Rules of Antitrust Damages*, 49 Antitrust Law Journal 125 (1980)	5
Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 Minn. L.R. 751 (1980)	4
Ross, *A Philadelphia Lawyer's Class Action Gold Mine*, Fortune, September 7, 1981	2

No. 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner

v.

LYMAN LAMB COMPANY, PLYWOODS DISTRIBUTING COMPANY, BATON ROUGE LUMBER COMPANY, CITY OF ARKADELPHIA, ARKANSAS, *et al.*,
Respondents.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States (or "Chamber") respectfully refers this Court to the interest articulated in its Motion for Leave to File a Brief *Amicus Curiae* to which this brief is attached.

REASONS FOR GRANTING THE WRIT

The Chamber respectfully suggests that resolution of the propriety of the measure of damages[1] used in this case is particularly important in view of the fact that private antitrust actions initiated each year remain at a high level, and national

[1] This *amicus curiae* brief is limited to the issue of the measure of damages applied by the Fifth Circuit. The Chamber takes no position with regard to the merits of plaintiffs' antitrust complaint.

class action antitrust suits, involving massive amounts of money, are increasing.[2] The opinion of the Fifth Circuit below has important implications for all those cases. Supreme Court guidance could eliminate or substantially reduce needless litigation over damage calculation issues, would ensure some continued measure of predictability in the calculation of the potential gain of the plaintiff or loss of the defendant, and, therefore, could encourage early settlements of many cases: a result that could benefit all concerned.

It is against this backdrop that the Chamber requests the Court to grant petitioner's request for Supreme Court review. For not only are staggering sums of money involved directly in this case, but the outcome of this case can portend a continuation of massive claims which are based upon a questionable method of calculating damages.

The instant case arose out of the defendants' historically based practice of quoting the price of plywood sold from their southern mills with "west coast freight" added to the base or "mill" price.[3]

Plywood was originally manufactured only in the Pacific Northwest. Freight from that location to any purchaser, wherever located, was easily calculated by reference to the standard shipping zones. Hence, the practice arose in the industry of quoting a "delivered" price of plywood in terms of the base or "mill" price plus "west coast freight."

Subsequent technological innovations allowed the manufacture of plywood using types of lumber available in the South. Accordingly, defendants established manufacturing facilities in the South. In what the Federal Trade Commission and the Ninth Circuit characterized as "a natural development"

---

[2] The Annual Report of the Director of the Administrative Office of the United States indicates that on the average, over 1350 private antitrust cases have been filed each year since 1971. *See also*, Ross, *A Philadelphia Lawyer's Class-Action Gold Mine*, Fortune, September 7, 1981 at 100.

[3] The underlying facts, the proceedings below, and before the Federal Trade Commission and Ninth Circuit, are fully described in petitioners' briefs. We will not burden the Court with a detailed repetition of that information, but respectfully refer the Court to those briefs.

at its inception, the southern mills priced their plywood using the "west coast freight" convention for quoting price. *Boise Cascade Corp.* v. *Federal Trade Commission,* Appendix, J-2. Inasmuch as during the early years of the southern plywood industry, western plywood retained a dominant market share, (*Id.*) this method of pricing allowed purchasers to make a ready comparison of the prices of the Southern mills and those in the Pacific Northwest.

In this regard, the Ninth Circuit found, "Since southern plywood was widely viewed as inferior in quality to western plywood, it was necessary to sell southern plywood at a slightly lower price." *Id.* " The use of west coast freight made possible ready comparison between Western and Southern plywood prices, [and] encouraged expansion of southern mills...."[4] Appendix, J-2-3.

This finding is at the heart of the Chamber's concern over the method of computing damages utilized by the Fifth Circuit in this case. For the Fifth Circuit virtually ignored the facts that defendants had utilized western freight precisely so that they could compete with western plywood, and, more importantly, had reduced the mill price so as to provide a competitive "delivered" price.

Despite these facts, the Fifth Circuit found that the measure of the plaintiffs' damages was the total difference between the western freight charged, and what the actual freight would have been. *In Re Plywood Antitrust Litigation,* Appendix, A-10. No offset was allowed for the reduced mill price given to the purchasers, and no analysis of the "delivered" prices was undertaken.

---

[4] Utilization of eastern shipping rates would not have sufficed since eastern freight was computed on a point to point basis while western freight was computed by zones. *Boise Cascade Corp.* v. *F.T.C.,* Appendix, J-2 at n.1. (9th Cir. 1980)

By examining the western freight charge in isolation, the Fifth Circuit ignores well-established principles of determining damages in cases involving price fixing or other means of price enhancement. *See generally,* Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases,* 64 Minn. Law Review 751, 751-763 (1980). Prior to the Fifth Circuit's decision, it was well established that the,

> "fundamental objective of an award of damages is to place the plaintiff in the position in which he would have been but for the violation [footnote omitted]. In cases involving price fixing among sellers . . . , the basic measure of a purchaser's damages is the difference between the price paid by the purchaser and the price that would have been paid in the absence of the violation." [footnote omitted].

Adams and Bock, *Damages in Horizontal Price Fixing Cases,* 49 Antitrust Law Journal 141, 142 (1980). *Accord, Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390, 396 (1906). Because of the interrelationship between the mill price and the western freight charge, it defies these principles to determine the differences in delivered price by examining the western freight charge alone.

Moreover, we believe the Fifth Circuit's conclusion violates this Court's recent holding in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*,[5] that plaintiffs in Clayton Act cases must prove more than mere violation to recover damages under §4. While the Court in *Payne* recognized that plaintiffs attempting to prove damages in §4 cases should not be held to a rigorous standard of proof, we suggest that inherent in the Court's rejection of automatic damages there is the proposition that the damages awarded to plaintiffs accurately measure the loss they have suffered.

The Fifth Circuit in essence admitted that its holding did not necessarily result in an accurate measure of the damages to the plaintiffs, stating that "given proof of the fact of injury, proof of losses which border on the speculative is allowed . . .", Appendix, A-10. But Section 4 of the Clayton Act

---

[5] 451 U.S. 557 (1981)

awards the successful plaintiff in an antitrust action, "threefold the damages *by him sustained.*" 15 U.S.C. §15 (1976) (Emphasis added).

We submit that the Fifth Circuit's use of an inaccurate measure of damages that "borders on the speculative" contradicts the plain meaning of Section 4, as well as past decisions of this Court. Section 4, as noted above, only allows recovery for actual damages sustained. Here the Fifth Circuit goes one step further, awarding damages never incurred by the plaintiffs.

As the Honorable Cecelia H. Goetz [6] has noted:

> Where the fact of damage has been established, the courts are required to be liberal with respect to the degree of certainty required to prove its dollar amount, *although not to the point where reliance is placed on speculation or guesswork:*
>
> > Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, *while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. Story Parchment Co.* v. *Paterson Parchment, Paper Co.*, 282 U.S. 555, 563 (emphasis added).

Goetz, *The Basic Rules of Antitrust Damages*, 49 Antitrust Law Journal 125, 129 (1980) (emphasis added).

The Second Circuit has similarly stated that the "true measure of damages is the price increment caused by the anticompetitive conduct that originated or augmented the

---

[6] Bankruptcy Judge, United States District Court for the Eastern District of New York.

monopolist's control over the market. * * * Accordingly, a purchaser may recover only for the price increment that 'flows from' the distortion of the marketplace caused by . . . anti-competitive conduct." *Berkey Photo, Inc.* v. *Eastern Kodak Co.*, 603 F.2d 263, 297 (1979).

The Fifth Circuit's application of an erroneous measure of damages stands these principles on their heads. The court apparently believes that the application of a measure of damages that is not based on the actual loss to the plaintiffs enhances the deterrent effect of the antitrust laws. *In Re Plywood Antitrust Litigation*, Appendix, A-10.

Section 4 of the Clayton Act is, of course, designed to both "deter violators and deprive them of the 'fruits of their illegality', and 'to compensate victims of antitrust violations for their injuries'." (citations omitted) *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 314 (1978).

The Chamber respectfully suggests, however, that inasmuch as the punitive nature of antitrust damages arises from the statutory trebling, it is contrary to both congressional intent and basic concepts of fairness to additionally penalize defendants by trebling damages the plaintiffs never incurred.

Professor Areeda has, in fact, suggested that it is unfair to subject defendants to treble damages,

> when novel principles are established, the law is unclear, or even where the liability determination rests on close and uncertain economic factual determinations . . .
>
> Thus, an appropriate scheme would reserve treble damages, like criminal sanctions, for well-defined offenses; provide for single damages in other cases; and perhaps even preclude damages where a previously unimpaired precedent is overruled.

2 P. Areeda & D. Turner, Antitrust Law §322, at 105 (1978). Professor Areeda's logic is particularly appropriate here, where,

on identical facts, two circuits have differed as to the existence of the violation.[7]

While Professor Areeda's suggestion calls for legislative action, the principle he espouses, that only economically sensible measures of damage be employed, is equally applicable here. Before plaintiffs can begin to prove their individual losses, the court must settle upon a formula that will accurately measure those losses. Then, any ambiguity in the proof of the individual plaintiff's losses can be viewed liberally in their favor. But where an accurate yardstick to measure the damages can be easily established, it defies logic to use a measure that "borders on the speculative."

CONCLUSION

The Chamber of Commerce respectfully urges that the petition for certiorari be granted.

Respectfully submitted,

STANLEY T. KALECZYC, ESQ.
(Counsel of Record)
STEPHEN A. BOKAT, ESQ.

National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3180

Attorneys for the Chamber of Commerce of the United States of America

[7] The Chamber does not urge that treble damages are necessarily inappropriate in a case of this type, but rather points to Professor Areeda to demonstrate that it was particularly unjust for the Fifth Circuit to treble damages never incurred by the plaintiffs.

81-1619

Title

No.

DATE	PROCEEDINGS AND ORDERS
uly 21, 1982	Application for leave to file the petitioner's brief on the merits in excess of page limitations, and order granting same, by Marshall, J., not to exceed 75 pages.
Aug. 13, 1982	Brief, amicus curiae, for the U.S. filed. (vide 81-1618)
Aug. 16, 1982	Brief for petitioners Weyerhaeuser Company and Willamette Industries, Inc. filed. (Vide 81-1618)
Aug. 16, 1982	Joint appendix filed (Vide 81-1618)
Aug. 16, 1982	Motion of The Business Roundtable, et al. for leave to file a brief as amici curiae filed. (Vide: 81-1618)
Aug. 18, 1982	Brief for the petitioner, Georgia-Pacific Corp. filed. (Vide: 81-1618)
Aug. 26, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for additional time for oral argument filed. (Vide: 81-1618)
Sept. 13, 1982	Order extending time to file respondents' brief on the merits until Oct. 15, 1982.
Sept. 17, 1982	Motion of City Investing Company and The International Telephone and Telegraph Corporation for leave to file a brief as amici curiae filed. (Vide: 81-1618).
Oct. 4, 1982	The motion of The Business Roundtable, et al. for leave to file a brief as amici curiae is GRANTED. The motion of City Investing Company, et al. for leave to file a brief as amici curiae is GRANTED. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument is GRANTED, and ten additional minutes are allotted for that purpose. White, J., OUT.
Sept. 30, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations, and order granting same by Marshall, J., 10/4/82, not to exceed 70 pages.
Oct. 14, 1982	Brief, amici curiae, of the States of Alaska, Arizona, et al., in support of respondents filed. (Vide: 81-1619).
Oct. 14, 1982	Motion of Forty-One States and the District of Columbia for leave to participate in oral argument as amici curiae and for additional time for oral argument filed. (Also in 81-1618)
Oct. 15, 1982	Brief for the respondents filed. (Vide: 81-1618).
Oct. 15, 1982	Motion of the National Lumber and Building Material Dealers Association for leave to file a brief as amicus curiae filed. (Vide: 81-1618).
Oct. 15, 1982	Motion of respondents for relief from compliance with Rule 28.1 filed.
Oct. 25, 1982	DISTRIBUTED. 10-29. (Above motion).

(Card No. 2)

NO. 81-1619-CFX	TITLE Georgia-Pacific Corporation, Petitioner v. Lyman Lamb Company

DOCKETED	COURT
Mar. 2, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
Nov. 1, 1982	The motion of Alaska, et al. for leave to participate in oral argument as amici curiae and for additional time for oral argument is DENIED. The motion of National Lumber and Building Material Dealers Association for leave to file a brief as amicus curiae is GRANTED. White J., OUT.
Nov. 1, 1982	REDISTRIBUTED. 11-5. (Motion of respondents for relief from compliance with Ruel 23.1).
Nov. 8, 1982	The motion of respondents for relief from compliance with Rule 28.1 is GRANTED. White, Powell, and O'Connor, JJ., OUT.
Dec. 14, 1982	Reply brief of petitioners', Weyerhaeuser Company, et al. filed.
June 14, 1983	Dismissed under Rule 53.